

*State v. Korum (Jacob Melvin)*

Majority by Fairhurst, J.

Dissent by Madsen, J.

Concurring in the dissent C. Johnson, J.

No. 75491-8

C. JOHNSON, J. (concurring in the dissent)—While I agree with Justice Madsen’s dissent, I write separately to point out a potential problem that may arise at resentencing on remand.

Justice Fairhurst’s opinion concludes that the sentencing court did not err in refusing to apply RCW 9.94A.535(1)(g) in imposing sentence. Since this case is remanded for resentencing and the sentencing court will make a new record, this issue perhaps need not be addressed. However, Justice Fairhurst errs in confusing the requirements of RCW 9.94A.535(1)(g) with the requirements of imposing an exceptional sentence below the standard range under RCW 9.94A.535. While the statutory requirements appear to be the same, a slight but significant distinction exists.

In the typical case where a judge considers sentencing below the standard range for a criminal conviction, a finding of substantial or

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compelling reasons must

be found to support the exceptional downward departure. The inquiry is slightly different in choosing the appropriate sentence where RCW 9.94A.535(1)(g) is invoked. This section requires that where multiple convictions exist, the sentencing court must determine whether the standard range mandated by the guidelines is clearly excessive. The distinction in approach is somewhat subtle but significant. Where a judge makes a “clearly excessive” determination, the substantial and compelling reasons to justify a downward sentence departure are satisfied. Most critical is the record the sentencing court must make when imposing the appropriate sentence.

RCW 9.94A.535(1)(g) provides authority for judges when imposing sentence to consider a departure from the standard range where “[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.” RCW 9.94A.010 directs that sentencing discretion should be focused to “[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the

offender's criminal history." RCW 9.94A.010(1).

While the statute does involve a degree of discretion, in order to facilitate review, the judge when imposing sentence, in cases such as we have here, should make a complete record, which should include a determination of the seriousness of the offense or offenses, the offenders' criminal history, and the proportionality of the sentence imposed. A complete record will facilitate appellate review.

AUTHOR:

Justice Charles W. Johnson

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WE CONCUR:

Justice Tom Chambers

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Justice Richard B. Sanders

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